

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
MARCH 28, 2006 Session

**DONLEY D. SIDDALL, M.D. v. TENNESSEE BOARD OF MEDICAL  
EXAMINERS**

**Direct Appeal from the Chancery Court for Davidson County  
No. 04-688-IV     Richard Dinkins, Chancellor**

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**No. M2004-02767-COA-R3-CV - Filed on June 27, 2006**

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In this appeal, we are asked to determine if the chancery court erred when it upheld the Tennessee Board of Medical Examiners' decision to revoke a physician's medical license. On appeal, the physician asserts that there was not material and substantial evidence to support the charges against him (1) because the Tennessee Board of Medical Examiners failed to present expert medical testimony in compliance with section 29-26-115 of the Tennessee Code to establish a standard of care as to the gross malpractice and unprofessional, dishonorable, or unethical conduct charges, (2) because the Tennessee Board of Medical Examiners failed to articulate a professional standard of care for the sound medical practices exception to rule 0880-2-.14(7) of the Official Compilation of Rules & Regulations of the State of Tennessee, and (3) that he did not provide sound medical practices under the express exceptions under rule 0880-2-.14(7) of the Official Compilation of Rules & Regulations of the State of Tennessee. We affirm.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed**

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and DONALD P. HARRIS, SP. J., joined.

John S. Hicks, Timothy L. McIntire, Nashville, TN, for Appellant

Paul G. Summers, Attorney General & Reporter; Sue A. Sheldon, Senior Counsel, Nashville, TN, for Appellee

## OPINION

### I. FACTS & PROCEDURAL HISTORY

On February 21, 2003, Dr. Donley Siddall (“Siddall” or “Appellant”) sold a prescription for Phentermine<sup>1</sup> for a fictitious individual to an undercover police officer, Officer Anthony D. Beverly (“Officer Beverly”). Prior to the sale, Officer Beverly received information that Siddall was selling prohibited controlled substances from his automobile. After the arrest was made, Officer Beverly obtained a search warrant for Siddall’s automobile and found in the trunk: (1) approximately 3,500 pills of varying colors in mostly unlabeled bottles, (2) \$4,000 in cash, (3) nineteen prescription pads with some pads containing pre-printed language-PHENTERMINE 37.5 mg #30, (4) computer printouts from S & W Pharmacy, Dalton, Georgia, listing Siddall as the prescribing physician in the name of patient “A” for the drug Phendimetrazine,<sup>2</sup> and (5) twenty-nine large manilla envelopes containing names and addresses of his “patients.”

On September 30, 2003, the Tennessee Board of Medical Examiners (the “Board” or “Appellee”) filed a notice of charges against Siddall, including (1) failing to perform the required protocol pursuant to Tenn. Comp. Adm. R. & Regs. 0880-2-.14(7),<sup>3</sup> (2) engaging “in a practice of ordering, selling and otherwise distributing Phendimetrazine (Bontril) without applying for and receiving written approval for the clinical investigation of such drug under a protocol satisfactory to the Board in violation” of Tenn. Comp. Adm. R. & Regs. 0880-2-.4(3)(c), and (3) failing “in his specialized practice of medicine to establish satisfactory medical continuity of care.” At the conclusion of the hearing, the Board found Siddall guilty of the charges against him, revoked Siddall’s medical license, and assessed Siddall \$6,000 in civil penalties and administrative proceedings costs. On March 5, 2004, Siddall filed a petition for judicial review of the Board’s decision pursuant to section 4-5-322 of the Tennessee Code. On October 12, 2004, the chancery court affirmed the Board’s final order in all respects and dismissed Siddall’s petition for judicial review.

### II. ISSUE PRESENTED

Appellant has timely filed his notice of appeal and presents the following issue for review:

1. Whether the chancery court erred when it found substantial and material evidence to support the Board’s decision.

For the following reasons, we affirm the decision of the chancery court.

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<sup>1</sup> Phentermine is a schedule IV controlled substance. Tenn. Code Ann. § 39-17-412(e)(5) (2003).

<sup>2</sup> Phendimetrazine is a schedule III controlled substance. Tenn. Code Ann. § 39-17-410(b)(5) (2003).

<sup>3</sup> Appellant was also charged with violations of sections 63-6-214(b)(1), (4), and (12) of the Tennessee Code based on his violation of rule 0880-2-.14(7) of the Official Compilation of Rules & Regulations of the State of Tennessee.

### III. STANDARD OF REVIEW

When reviewing a contested case under the Tennessee Administrative Procedures Act,

[t]he court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) (A) Unsupported by evidence that is both substantial and material in the light of the entire record.  
(B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h)(1)-(5) (2005). “The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.” Tenn. Code Ann. § 4-5-322(g) (2005). Further,

[t]his court may not substitute its judgment for that of the agency in reviewing the evidence. However, the substantial and material evidence standard “requires a searching and careful inquiry and subjects the agency’s decision to close scrutiny.” *National Council on Compensation Ins. v. Gaddis*, 786 S.W.2d 240, 242 (Tenn. App. 1989). “Substantial and material evidence is ‘such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.’” *Southern Ry. Co. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984) (quoting *Pace v. Garbage Disposal Dist. of Washington County*, 54 Tenn. App. 263, 390 S.W.2d 461, 463 (1965)). This standard “‘requires something less than a preponderance of the evidence . . . but more than a scintilla or glimmer’” of relevant evidence. *Estate of Street v. State Bd. of*

*Equalization*, 812 S.W.2d 583, 585-86 (Tenn. App. 1990) (citations omitted). The agency's decision is arbitrary if it lacks any rational basis. *Pace Co., Div. of AMBAC I., Inc. v. Dept. of Army*, 344 F. Supp. 787, 790 (W.D. Tenn. 1971).

***MobileComm of Tenn. v. Tenn. Pub. Serv. Comm'n***, 876 S.W.2d 101, 104 (Tenn. Ct. App. 1993).

#### IV. DISCUSSION

On appeal, Appellant asserts that the chancery court erred when it upheld the Board's decision to revoke Appellant's medical license. Appellant argues that the Board failed to demonstrate material and substantial evidence to support its decision because (1) it did not present competent medical expert testimony in compliance with section 29-26-115 of the Tennessee Code to establish a standard of care as to the gross malpractice and unprofessional, dishonorable, or unethical conduct charges and (2) it failed to articulate a professional standard of care for the sound medical practices exception to rule 0880-2-.14(7) of the Official Compilation of Rules & Regulations of the State of Tennessee. Further, Appellant contends that there was not substantial and material evidence to support that he did not provide sound medical practices under the express exceptions found in rule 0880-2-.14(7).

First, Appellant asserts that there was not substantial and material evidence to support the Board's decision because the Board did not present competent expert testimony to prove the charges concerning gross malpractice and unprofessional, dishonorable or unethical conduct.

To support his assertions, Appellant relies on ***Tennessee Department of Health, Division of Health Related Boards v. Frisbee***, No. 01A01-9511-CH-00540, 1998 Tenn. App. LEXIS 14 (Tenn. Ct. App. Jan. 9, 1998), and ***Williams v. Tennessee Board of Medical Examiners***, 01-A-01-9402-CH-00060, 1994 Tenn. App. LEXIS 443 (Tenn Ct. App. Aug. 12, 1994). In *Frisbee* and *Williams*, this Court found that disciplinary charges against a physician based on gross malpractice pursuant to section 63-6-214(b)(4) of the Tennessee Code must be supported by proof in the form of an expert witness who meets the qualifications established by section 29-26-115 of the Tennessee Code. However, the applicable law has changed since the physicians in those cases were found to have committed malpractice by the Board.

Under the law applicable to Appellant, section 63-6-214(g) of the Tennessee Code states

[f]or purposes of actions taken pursuant to subdivisions (b)(4), (12) and (13) or any other subsection in which the standard of care is an issue, any Tennessee licensed physician serving as a board member, hearing officer, designee, arbitrator or mediator is entitled to rely upon that person's own expertise in making determinations concerning the standard of care and is not subject to voir dire concerning such expertise. Expert testimony is not necessary to establish the standard of care. The standard of care for such actions

is a statewide standard of minimal competency and practice that does not depend upon expert testimony for its establishment. However, to sustain actions based upon a violation of this standard of care, the board must, in the absence of admissions or other testimony by any respondent or such respondent's agent to the effect that the standard was violated, articulate what the standard of care is in its deliberations. The provisions of title 29, chapter 26, and specifically § 29-26-115, concerning the locality rule, do not apply to actions taken pursuant to this chapter.

Tenn. Code Ann. § 63-6-214(g) (1997 & Supp. 2004). As such, based on the plain, unambiguous language of section 63-6-214(g), we conclude that the chancery court properly found that the Board did not have to present peer expert testimony in compliance with section 29-26-115 of the Tennessee Code to prove a standard of care for any of the charges brought pursuant to section 63-6-214(b) of the Tennessee Code against Appellant.

Thus, our analysis turns to whether there was substantial and material evidence to support Appellee's charges. Although Appellee is not required to present expert testimony, it still must articulate a standard of care to establish a statewide standard of minimum competency and practice. In this case, Appellee's charges against Appellant for violations of sections 63-6-214(b)(1), (4), and (12) were based on Appellant's violation of Rule 0880-2-.14-7 of the Official Compilation of Rules & Regulations of the State of Tennessee. Rule 0880-2-.14-7 of the Official Compilation of Rules & Regulations of the State of Tennessee, which establishes a standard of care for issuing prescriptions or dispensing medications either in person, electronically, or over the Internet, states that

[e]xcept as provided in subparagraph (b), it shall be a prima facie violation of T.C.A. § 63-6-214(b)(1), (4), and (12) for a physician to prescribe or dispense any drug to any individual, whether in person or by electronic means or over the Internet or over telephone lines, unless the physician, or his/her licensed supervisor pursuant to appropriate protocols or medical orders, has first done and appropriately documented, for the person to whom a prescription is to be issued or drugs dispensed, all of the following:

1. Performed an appropriate history and physical examination; and
2. Made a diagnosis based upon the examinations and all diagnostic and laboratory tests consistent with good medical care; and

3. Formulated a therapeutic plan, and discussed it, along with the basis for it and the risks and benefits of various treatments options, a part of which might be the prescription or dispensed drug, with the patient; and
4. Insured availability of the physician or coverage for the patient for appropriate follow-up care.

Tenn. Comp. Admin. R. & Regs. 0880-2-.14(7)(a) (2003). As such, we find that the Board adequately established a standard of care by which to judge Appellant's actions when determining whether to suspend or revoke Appellant's license.

Given this standard of care, we conclude that there was substantial and material evidence to support that Appellant violated rule 0880-2-.14(7)(a) of the Official Compilation of Rules and Regulations of the State of Tennessee. Evidence at the hearing demonstrated that Officer Beverly approached Appellant and asked for a prescription for weight control pills for his "wife." Thereafter, Officer Beverly gave Appellant fictitious information about his "wife." Appellant then wrote a prescription for the fictitious wife and charged an "office" fee for the prescription. At no time did Appellant perform any of the required actions so as to comply with rule 0880-2-.14(7)(a).

Next, Appellant contends that the Board ignored the exception to rule 0880-2-.14(7) when it revoked Appellee's license based on his violations of rule 0880-2-.14(7). Specifically, Appellant argues that Appellee failed to articulate a professional standard of care for the sound medical practice exception to rule 0880-2-.14(7)(b) and that there was not substantial and material evidence to demonstrate that Appellant's conduct fell below the sound medical practices exception.

However, in this case, Appellee was not required to establish a standard of care for the sound medical practice exception. Appellee had already made out a prima facie case that Appellant had violated sections 63-6-214(b)(1), (4), and (12). The burden then shifted to Appellant to overcome this presumption. To do so, Appellant had to either demonstrate that he complied with the requirements of rule 0880-2-.14(7)(a) or the sound medical practice exception under rule 0880-2-.14(7)(b).

In this case, Appellant attempted to demonstrate that he met the sound medical practice exception because he complied with the sound medical practices under rules 0880-2-.14(7)(b)(3) and (4).<sup>4</sup> To prove his assertions, Appellant testified that it was his belief that he was prescribing refill medication for an existing patient. However, the record establishes that Appellant made no attempt to confirm that the fictitious person created by Officer Beverly was actually one of his patients before

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<sup>4</sup> Rule 0880-2-.14(7)(b)(3) permits a physician to prescribe "continuation medications on a short-term basis for a new patient prior to the patient's first appointment." Tenn. Comp. Admin. R. & Regs. 0880-2-.14(7)(b)(3). Rule 0880-2-.14(7)(b)(4) permits a physician to prescribe medication to "established patients who, based on sound medical practices, the physician feels do not require a new physical examination before issuing new prescriptions." Tenn. Comp. Admin. R. & Regs. 0880-2-.14(7)(b)(4).

writing a prescription for the fictitious person. Further, by stating that he thought Officer Beverly's "wife" was a current patient, Appellant demonstrated that he did not meet the sound medical practice exception pursuant to rule 0880-2-.14(7)(b)(3), which allows for the prescribing of continuation medications on a short-term basis to new patients. Additionally, even if we were to assume that Officer Beverly's "wife" was a new patient, the evidence demonstrates that he was never told what kind of medication the "wife" was currently taking. He was only informed that she was taking "weight control pills." As such, we conclude that there was material and substantial evidence to support the decision that he did not comply with the sound medical practice exemption. As such, the chancery court properly upheld the Board's revocation of Appellant's medical license.<sup>5</sup> Accordingly, we affirm the chancery court's decision.

## V. CONCLUSION

For the foregoing reasons, we affirm the decision of the chancery court. Costs of this appeal are taxed to Appellant, Donley D. Siddall, M.D., and his surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE

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<sup>5</sup> This Court is mindful that Appellee also found that Appellant violated rule 0880-2-.4(3)(c) of the Official Rules & Regulations of the State of Tennessee for prescribing Phendimetrazine without applying for and receiving written approval for the clinical investigation of such drug under a protocol satisfactory to the Board. Appellant has asserted that there was not material and substantial evidence to support this charge. Even assuming that there was not material and substantial evidence to support such charge, the other charges that were supported by material and substantial evidence were enough to support the Board's decision to revoke Appellant's medical license. As such, we need not reach a decision as to whether there was substantial and material evidence to support this charge.